IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-738

THE MESCALERO APACHE TRIBE,

Petitioner,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,

Respondents.

WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

BRIEF OF MONTANA INTER-TRIBAL POLICY BOARD AS *AMICUS CURIAE*

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The Montana Inter-Tribal Policy Board, as *amicus curiae*, submits this brief on behalf of all Montana Indians. Petitioner and Respondents have stipulated by written consent to the filing of this brief, which consent has been filed with the Clerk of the Court.

Interest of *Amicus Curiae*

The Montana Inter-Tribal Policy Board represents approximately 27,000 Indians living in the State of Montana. About 20,000 Indians live on or near the seven Montana Indian Reservations which contain the following Indian

tribes: Arapahoe, Assiniboine, Blackfeet, Chippewa, Cree, Crow, Flathead, Gros Ventre, Northern Cheyenne, and Sioux.

Most of these tribes, like Petitioner, The Mescalero Apache Tribe, have retained their customs, laws and tribal government, are organized pursuant to the Indian Reorganization Act of 1934,[1] and are currently expanding their governmental functions. These Montana tribes provide their members with governmental administration and services, including: civil and criminal courts; health, education, and welfare programs; and capital improvements. These activities require that the tribes raise substantial revenue from their own limited financial resources and those of their members.

New Mexico's assertion that it has power to tax a tribal enterprise poses a direct threat to the viability of tribal self-government in Montana as well as in New Mexico. The Montana tribes have also organized tribal enterprises for the purpose of increasing opportunities for Indians to become self-supporting and to provide revenue for the tribe itself. These enterprises include agricultural and livestock cooperatives as well as craft organizations for the sale of Indian handicraft products.

The Montana Indian tribes have protective treaties with the federal government similar to those of the Mescalero Apache Tribe.[2] The enabling acts of New Mexico and Mon-

[1] 25 U.S.C. § 476.

[2] *Compare* the Apache Treaty of 1852 (10 Stat. 979) *with* the Navajo Treaty of 1868 (15 Stat. 667) and the Treaty with the Crow Indians 1868 (15 Stat. 649). See generally *United States* v. *Santa Fe Pacific R. Co.*, 314 U.S. 339, 346 n.4, 347-48 (1941) and *Mellakatla Indian Community* v. *Egan*, 369 U.S. 45, 52 (1962).

tana have identical disclaimer provisions leaving Indian lands "under the absolute jurisdiction and control"[3] of the United States, and very similar provisions allowing the states to tax "any Indian" off the reservation.

A decision upholding New Mexico's tax levy might authorise Montana to tax the business ventures of the tribes represented by the Montana Inter-Tribal Policy Board. Such taxation would effectively destroy the residual aboriginal right of these tribes to make and be governed by their own laws, a result that contravenes the applicable treaties with the United States government and acts of Congress.

The States of Montana and New Mexico have only minimal responsibility for Indians. With only one minor exception,[4] neither state has the responsibility of civil or criminal jurisdiction over Indians on reservations within their borders. It is submitted that where a state imposes taxes on Indians or Indian tribes when it does not have, nor has Congress or the Indians themselves put upon them, corresponding responsibilities for the well being of these Indians, it is grossly unfair and in violation of the due process rights guaranteed Indians by the Fourteenth Amendment to the United States Constitution.

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[3] *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 68 (1962), notes this identical language.

[4] The exception is Montana's exercise of criminal and some civil jurisdiction on the Flathead Reservation where some 80 percent of the residents are non-Indians. See *State ex rel. McDonald* v. *District Court*, —— Mont. ——, 496 P.2d 78 (1972), and *Kennerly* v. *District Court of Montana*, 400 U.S. 423, 425 (1971).

Summary of Argument

I. State taxation of self-governing Indian tribes is precluded by the residual aboriginal sovereignty of those tribes where such sovereignty is recognized by treaty between the Indian tribes and the federal government, has not been relinquished by the tribe, and has not been modified by act of Congress. The sovereignty of the Mescalero Apache Tribe was guaranteed to it by the Apache Treaty of 1852 (10 Stat. 979), and has never been relinquished or abandoned by the Tribe. Subsequent acts of Congress have not significantly modified the rights to sovereignty guaranteed by this treaty. A state's direct taxation of a tribe severely jeopardizes the continued viability of its treaty-guaranteed sovereignty by directly reducing the income and resources available to finance tribal governmental functions.

II. Due process of the law prevents states from levying taxes upon entities for whom it has accepted only minimal governmental responsibilities.

ARGUMENT

I.

State taxation of self-governing Indian tribes is precluded by the aboriginal sovereignty of those tribes where such sovereignty is recognized by treaty, not abandoned by the Indians, and not modified by act of Congress.

A. *Where the Aboriginal Internal Sovereignty Rights of Indian Tribes Are Protected by Treaty With the Federal Government, Such Rights May Be Modified Only by Congressional Act or by Consent of the Indians Themselves.*

As "Native Americans," Indian tribes enjoyed the aboriginal status of completely sovereign nations.[5] They relinquished their sovereignty to the federal government only to the extent provided by treaty. The scope of such relinquishment can be expanded only by subsequent act of Congress, or by the Indians' consensual abandonment of such rights. Federal treaties with the Indians recognized and protected the Indians' pre-existing internal tribal sovereignty,[6] and the Indian tribes that became parties to

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[5] *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832): "The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights . . . from time immemorial."

[6] See F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1942) (U. New Mexico Press reprint 1971) 122 [hereinafter cited as COHEN]: "Perhaps the most basic principle of all Indian law, supported by a host of decisions hereinafter analyzed, is the principle that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.*" (Emphasis in original).

such treaties accordingly assumed the status of dependent, self-governing "nations."[7]

Thus, in the landmark decision of *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832), Chief Justice Marshall stated of the "Cherokee Nation":

> The Cherokee nation, then, is a distinct community, occupying its own territory, . . . in which the laws of Georgia can have no force . . .
>
> • • •
>
> [The Georgia laws asserting jurisdiction over a non-Indian in the Cherokee domain] interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our Constitution, are committed exclusively to the government of the Union. They are in direct hostility with treaties, repeated in a succession of years, which mark out the boundary that separates the Cherokee country from Georgia; guaranty to them all the land within their boundary; solemnly pledge the faith of the United States to restrain their citizens from trespassing on it; and recognise the pre-existing power of the nation to govern itself.
>
> They are in hostility with the acts of Congress for regulating this intercourse, and giving effect to the treaties.[8]

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[7] *Worcester* v. *Georgia*, 31 U.S. at 559-60: "We have applied them [the words "treaty" and "nation"] to Indians, as we have applied them to other nations of the earth; they are applied to all in the same sense . . ." See also, Comment, *Indian Taxation: Underlying Policies and Present Problems*, 59 CALIF. L. REV. 1261, 1264-66 (1971); and COHEN at 33-34: "That Treaties with Indian tribes are of the same dignity as treaties with foreign nations is a view that has been repeatedly confirmed by the federal courts and never successfully challenged."

[8] The principles of *Worcester* v. *Georgia* were held applicable to New Mexico Indians in *United States* v. *Santa Fe Pacific R. Co.*, 314 U.S. 339, 345-348 (1941).

The importance of this decision is its holding that the original treaty guaranties of the Indian tribes' right to be self-governing are absolute—*beyond State control under the Constitution*[9]—unless Congress, by subsequent treaty, or statute under its plenary power over Indians,[10] revises these treaty obligations. These treaty rights were reaffirmed in *Williams* v. *Lee*, 358 U.S. 217 (1959), which held that Navajo sovereignty recognized by the Treaty of 1868 was "infringed" by allowing a non-Indian residing on the Reservation to bring suit against a member of the Navajo Tribe in the Arizona civil courts, rather than the Navajo tribal courts. This Court stated:

> Implicit in these treaty terms, as it was in the treaties with the Cherokees involved in *Worcester* v. *Georgia*, was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed. . . .[11]

358 U.S. at 221. Accord: *United States* v. *Kagama*, 118 U.S. 375 (1886); *Ex parte Crow Dog*, 109 U.S. 556 (1883).

A state cannot, therefore, unilaterally assume jurisdiction over a treaty-protected, sovereign Indian tribe, even

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[9] The treaty power is contained in U.S. CONST. art. II, § 2, cl. 1. States are forbidden from entering into treaties by U.S. CONST. art. I, § 10, cl. 1. Federal treaties are binding on the states under U.S. CONST. art. VI, cl. 2: ". . . all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . ."

[10] Congress retains plenary power over the Indians under the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3: "To regulate commerce . . . with the Indian Tribes." See *Williams* v. *Lee*, 355 U.S. 214, 219 n. 4. (1959)

[11] It has been noted that federal policy toward the Indians in New Mexico and Arizona is comparable. See *United States* v. *Santa Fe Pacific R. Co.*, 314 U.S. 339, 346 (1941).

where the state has extended some measure of rights and privileges to the tribe. Any state statute which conflicts with the federal treaty protection of the residual right to tribal sovereignty is void under the Supremacy Clause (U.S. Const. art. VI, cl. 2). State jurisdiction can be obtained only by alteration of the treaty, by the Indians' abandonment of the right to tribal self-government, or by act of Congress:

> Conferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization. As long as the United States recognizes their national character they are under the protection of treaties and laws of Congress, and their property is withdrawn from operation of State laws.

The Kansas Indians, 72 U.S. (5 Wall.) 737, 757 (1866).

B. *Indian Tribes Who Have Retained Their Tribal Organization and Government Have Not Abandoned Their Aboriginal Sovereignty So as to Permit the Exercise of State Jurisdiction.*

States are totally precluded from jurisdiction over Indian tribes in any area where the Indians have retained their tribal sovereignty. Only where the right to tribal self-government has been abandoned by individual Indians or by a particular tribe and where the state has assumed full responsibility for such Indians may the state exercise jurisdiction over them.[12] Such was the case of the Oklahoma

[12] Even in these circumstances, such jurisdiction can be precluded by act of Congress. See *Metlakatla Indian Community* v. *Egan*, 369 U.S. 45 (1962).

Indians in *Leahy* v. *State Treasurer of Oklahoma*, 297 U.S. 420 (1936), which sustained a state tax on an Indian's share of his tribe's mineral resource income, and in *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598 (1943), which upheld application of the Oklahoma inheritance tax to the estate of an Indian. In *Oklahoma Tax Commission*, Justice Black, writing for the Court, discussed *Worcester* v. *Georgia* and its progeny and stated:

> The underlying principles on which these decisions are based do not fit the situation of the Oklahoma Indians. Although there are remnants of the form of tribal sovereignty, these Indians have no effective tribal autonomy as in *Worcester* v. *Georgia, supra;* and, unlike the Indians involved in *The Kansas Indians* case, *supra,* they are actually citizens of the State with little to distinguish them from all other citizens. . . . (319 U.S. at 603).

In *Organized Village of Kake* v. *Egan*, 369 U.S. 60 (1962), where state jurisdiction over Indians was sustained, there were facts showing that the Southeastern Alaskan Indians lacked the essential treaty-protected internal sovereignty: 1) the Indians had no formal treaty rights and no reservation; 2) Alaska had both civil and criminal jurisdiction over the Indians; and, as stated in the companion case of *Kellakatla Indian Community* v. *Egan*, 369 U.S. 45, 50-51 (1962), 3) these Indians had "substantially adopted and been adopted by the white man's civilization" and were not subject to "the principle of Indian national sovereignty enunciated in *Worcester* v. *Georgia.*"

Neither the Mescalero Apache Tribe nor the Montana tribes represented by *amicus curiae* have so abrogated their treaty rights to tribal sovereignty.

The Mescalero Apache Tribe has not abrogated its treaty-protected sovereign immunity from taxation even if this Court finds that it is "incorporated" pursuant to 25 U.S.C. §§ 477 and 470.[13] To do so would contradict the whole policy of the Indian Reorganization Act of 1934[14] of which these provisions are a part. The dual goals of this Act were to develop tribal self-government and encourage economic self-development. If compliance with the Act would cause a tribe to lose its sovereign immunity from taxation, the resulting direct reduction of revenue available to the tribe to perform its essential governmental functions would be a serious infringement of tribal sovereignty. The economic burdens of such a tax on the tribe would also hinder the related goal of encouraging economic self-development.

It is clear that the Mescalero Apache Tribe is in substance operating as a sovereign tribe and not as a business corporation. As stated in the "Stipulation of Fact"[15] under which the case was tried in the lower courts:

> 4. Sierra Blanca Ski Enterprises . . . is exclusively owned and operated by the Tribe. . . .
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> • • •
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> 6. The basic purpose of the ski resort is to provide revenue to the Tribe in lieu of raising revenue through the taxation of Tribal members or in some other manner. The revenue from the ski resort is

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[13] See *Mescalero Apache Tribe* v. *Jones*, 83 N.M. 158, 489 P.2d 666, 671 (Ct. App. 1971) (concurring opinion).

[14] 25 U.S.C. §§ 461-479.

[15] Appendix to *Memorandum for the United States as Amicus Curiae*, p. 12.

> to be used and is being used for the educational, social, and economic welfare of the Mescalero Apache people. . . .

Finally it would be an absurd and cruel result if the tax exemption of Indian tribes were interpreted to apply only to activities on the reservations. Many of the nation's Indians were restricted to economically unviable lands—largely those unwanted by the white man—as reservations. To effectively restrict their tax immunity to such areas would compound this injustice, and serve to shackle the tribes to such lands forever.

C. *Subsequent Congressional Acts Have Not Significantly Modified the Right to Self-Government Guaranteed to Indian Tribes by Treaty.*

Since the Mescalero Apache Tribe has not consented to New Mexico's assertion of tax jurisdiction nor have they abandoned or relinquished their treaty-guaranteed rights of self-government, the question remains whether these rights have been modified by act of Congress so as to permit such assertion of jurisdiction by the state.

Congress did not modify these rights when New Mexico was admitted to the Union. The New Mexico Enabling Act, which the Court of Appeals of New Mexico interpreted as "a specific grant of power" by which the "Federal Government permitted the State of New Mexico to tax [the Mescalero Apache Tribe]," [18] is clearly not a grant of power to tax land or property of an "Indian tribe." The relevant portion of the Enabling Act reads:

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[18] *Mescalero Apache Tribe* v. *Jones*, 83 N.M. 158, 161, 489 P.2d [illegible] (Ct. App. 1971).

> Sec. 20 . . . Second . . . [B]ut nothing herein, or in the ordinance herein provided for, shall preclude the said State from taxing as other lands and other property are taxed any land and other property outside of an Indian reservation owned or held by *any Indian*, save and except such lands as have granted or acquired as aforesaid or as may be granted or confirmed to *any Indian or Indians* under any Act of Congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said State so long and to such extent as Congress has prescribed or may hereinafter prescribe. [Emphasis supplied][17]

While the Enabling Act recognizes New Mexico's jurisdiction to tax individual Indians outside the sphere of treaty-protected tribal sovereignty,[18] it does not extend such jurisdiction to "Indian tribes," since "Indian tribes" are clearly not included in the term "any Indian." Where Congress meant "any Indian *or Indian Tribe*" in this section, it specifically stated so:

> Sec. 20 . . . Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by *any Indian or Indian Tribes*, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such *Indian or Indian tribes* shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; . . . [Emphasis supplied][19]

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[17] 36 Stat. 557, 569-70 (1910).

[18] See discussion of Oklahoma and Alaska Indians, *supra*, pp. 84.

[19] 36 Stat. 557, 569 (1910).

The Enabling Act should not be construed contrary to its explicit language to grant state tax jurisdiction over sovereign Indian tribes.[20]

Congress has occasionally employed its plenary power under the Commerce Clause to modify areas of traditional Indian tribal sovereignty and to extend to the states jurisdiction over Indian affairs. But without exception, such legislation has been specific and limited. For example, 25 U.S.C. § 398 represents a rare instance of congressional authorization of state taxation of land or other property within the sphere of tribal government. That statute permitted the states to tax mineral leaseholds on unallotted Indian land, but the grant of jurisdiction was carefully limited to provide that "such tax shall not become a lien or charge of any kind or character against the property of the Indian owner."[21]

As a result of this legislative pattern, federal statutes allowing states to assume some form of civil or criminal jurisdiction over Indian tribes have been strictly construed against the states. *Kennerly* v. *District Court of Montana*, 400 U.S. 423 (1971). In *Kennerly* this Court noted the specificity used when Congress granted to the states civil and criminal jurisdiction over Indians:

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[20] Furthermore, the Mescalero Apache Tribe is exempted from the New Mexico tax since the lands acquired, and their proceeds, are specifically exempted by 25 U.S.C. § 465. See *Memorandum for the United States as Amicus Curiae*, p. 7.

[21] See also 25 U.S.C. § 231, allowing state health inspections and enforcement of compulsory school attendance laws on Indian land, the latter, however, only if the tribe consents; and 18 U.S.C. § 1161 permitting the application of state laws dealing with the sale and possession of intoxicants, again, only if there is consent of the tribe.

> The statute [Section 4 of the Act of August 15, 1953, 67 Stat. 588] is illustrative of the detailed regulatory scrutiny which Congress has traditionally brought to bear on the extension of state jurisdiction, whether civil or criminal, to actions to which Indians are parties arising in Indian country. (400 U.S. at 421 n.1.)

The New Mexico Enabling Act should be likewise strictly construed against granting jurisdiction over Indian tribes and abrogating their treaty-protected sovereign immunity.

D. *The Continuing Viability of Tribal Sovereignty Would Be Severely Jeopardized by State Taxation of a Tribe.*

Indian tribes are "distinct independent political communities," [23] retaining all of the necessary powers for internal self-government derived from their aboriginal tribal sovereignty. These powers include, of course, the power to tax or otherwise raise revenues to provide necessary governmental services.

The federal government has consistently pursued a policy designed to secure viable self-government for the Indian tribes. Both the Indian Reorganization Act of 1934,[24] and Title IV of the Civil Rights Act of 1968[24] specifically provide for protection and development of the Indian tribes' right of self-government. Congress has further declared:

> [O]ur national policy shall give full recognition to and be predicated upon the unique relationship that exists between this group of citizens and the Federal Government. . . .
>
> . . . [I]mproving the quality and quantity of social and economic development efforts for Indian people and

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[23] *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

[24] 25 U.S.C. §§ 461-479.

[24] 25 U.S.C. §§ 1321-1326.

> maximizing opportunities for Indian control and self-determination shall be a major goal of our national Indian policy.

Senate Concurrent Resolution 26, December 11, 1971, 117 Cong. Rec. 21325-26 (daily ed. Dec. 11, 1971).

As Chief Justice Marshall stated: "[T]he power of taxing the people and their property is essential to the very existence of government. . . ."[25] If the Indian self-government guaranteed by treaties and acts of Congress is to be a reality, Indians must have effective power to raise the revenue necessary to support governmental functions. The severe economic poverty on most Indian reservations creates a meager tax base. To restrict Indian tribes' immunity from taxation to this meager tax base will seriously impinge on the American Indians' efforts toward self-improvement and self-government. Such taxation would effectively destroy the "choice" of self-government offered the Indians by treaty and under the Indian Reorganization Act of 1934,[26] and would eviscerate the Indians' right to administer the enforcement of their own tribal civil and criminal laws as recognized in Section IV of the Civil Rights Act of 1968.[27]

Clearly, state taxation of sovereign Indian tribes, contrary to the holding of the New Mexico Court of Appeals below, does significantly interfere with Indian self-government. Respondents' contention that the taxes imposed are an interference with a proprietary function rather than a governmental function (Respondents' Brief p. 14), completely ignores the stipulated fact that the operation of the

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[25] *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819).

[26] 25 U.S.C. §§ 461-479.

[27] 25 U.S.C. §§ 1321-1326.

ski resort was to provide revenue to the Tribe *in lieu of taxation* of Tribal members.[28]

II.

Due process of the law prevents states from levying taxes upon Indian tribes for whom it has only minimal governmental responsibilities.

Amicus Curiae contends that a state should not have jurisdiction to tax Indian tribes to whom it provides only minimal governmental services. The argument draws support from the proposition, discussed above, that where a tribe continues to govern its members and provide traditional governmental services, the states may not exercise conflicting jurisdiction. In *Warren Trading Post* v. *Arizona Tax Commission*, 380 U.S. 685, 691 (1965), Justice Black compared in detail the nature of the governmental services provided to the Indians by the state and those provided by the tribe with assistance of the federal government, concluding:

> [S]ince federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax.

Even where a state's power to tax Indians or Indian tribes has been sustained, as in *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598 (1942), this court has stressed that the nature and quantity of governmental services received by Indians from the State, and the failure of the

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[28] Stipulation of Fact, No. 6. Appendix to *Memorandum for the United States as Amicus Curiae*, p. 12.

Indian tribes to provide such services, were critical factors in determining whether the State might "reasonably" levy a tax. Speaking of the Oklahoma Indians, Justice Black noted:

> Oklahoma supplies for them and their children schools, roads, courts, police protection and all the other benefits of an ordered society. Citizens of Oklahoma must pay for these benefits. (319 U.S. at 608-609)

A state's lack of power to tax self-governing Indian tribes, such as the Mescalero Apache Tribe of New Mexico and the several tribes of Montana, may be further demonstrated by analogy to a state's lack of power to tax a foreign entity. In the leading case of *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435 (1940), this Court noted that such power is subject to the due process requirements of the Fourteenth Amendment,[20] and that consequently due process requires that the power to tax bear some relation to the protection, services, and benefits conferred by the state upon the taxed entity.

> "Taxable event," "jurisdiction to tax," "business situs," "extraterritoriality," are all compendious ways of implying the impotence of state power because

[20] Indians were made citizens of the United States for purposes of the Fourteenth Amendment by the Citizenship Act of 1924, 43 Stat. 253, *as amended*, 8 U.S.C. § 1401.

> (a) the following shall be nationals and citizens of the United States at birth:
>
> * * *
>
> (2) a person born in the United States to a member of an Indian, Eskimo, Aleutian or other aboriginal tribe: *Provided*, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property; . . .

See COHEN at 153, 179.

> state power has nothing on which to operate. These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one. That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. *The simple but controlling question is whether the state has given anything for which it can ask return.* (311 U.S. at 444) (emphasis supplied).

This test was reaffirmed as recently as 1967 in *National Bellas Hess, Inc.* v. *Dep't of Revenue,* 386 U.S. 753, 756 (1967). See also *General Motors Corp.* v. *Washington,* 377 U.S. 436, 441 (1964); *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450, 465 (1959); *International Harvester Co.* v. *Dep't of Taxation,* 322 U.S. 435, 442 (1943); and *Porto Rico Telephone Co.* v. *Descarte,* 255 F.2d 169, 175 (1st Cir. 1958).

In *National Bellas Hess, supra,* the State of Illinois was prohibited from imposing the duty of use tax collection and payment upon an out of state, mail-order seller. The minimal benefits provided by Illinois to the seller in that case, such as the use of banking and credit facilities and access to Illinois courts,[20] were not considered sufficient to justify the imposition of the tax on the foreign entity.

The services provided to the Mescalero Apache Tribe and its members by the State of New Mexico are minimal compared to those provided by the Mescalero Apaches themselves, by the federal government either directly or by

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[20] 386 U.S. at 762 (Fortas, J. dissenting).

its reimbursement of state expenditures.[21] The Mescalero Apaches, like the Montana tribes, provide their own executive administration, police force, tribal courts—both civil and criminal, educational programs and health programs. The Mescalero Apache Tribe has adopted a constitution and is a viable, functioning Indian tribe performing governmental functions under its constitution, tribal ordinances and applicable federal statutes. The Mescalero Apache court system relieves the state of significant costs in its administration of justice. Roads on the reservation are maintained by the Tribe and the Bureau of Indian Affairs. State schools which serve Indians are subsidized by the federal government.[22]

It is submitted that, just as a state may not constitutionally tax a foreign entity to which it furnishes only minimal services, due process of the law prevents it from taxing sovereign Indian tribes within its borders to whom it furnishes only minimal services, without violating due process of law.

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[21] See *inter alia*, 20 U.S.C. §§ 631 *et seq.* (school aid in federally impacted area); 25 U.S.C. § 318(a) (reservation roads); 25 U.S.C. § 452 (educational, medical, social programs); 25 U.S.C. § 639 (welfare programs); 42 U.S.C. § 2002 (health service program); 25 C.F.R. § 33.4 (education).

[22] The gross receipts tax imposed by New Mexico was intended as a means of raising money for public school education, yet the federal government now meets the bulk of the cost of educating the Indians. See Petitioners' brief, p. 29.

CONCLUSION

For the foregoing reasons the judgment of the [illegible] of Appeals of New Mexico should be reversed.

Respectfully submitted,

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